IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 24, 2007 Session

ROGER BALL and CARROL E. ROSE, LLC., v. BRUCE MCDOWELL, Individually and as Next Friend for D.B., C.B., B.B., Children under the age of Eighteen (18) years, PENNY CAYLOR, GARY ESTES, BRYAN KEITH BROCK, WARREN YONTS and PAULINE YONTS and JAMES D. YONTS

Direct Appeal from the Chancery Court for Claiborne County
No. 14,713 Hon. Billy J. White, Chancellor

No. E2007-00519-COA-R3-CV - FILED JANUARY 18, 2008

In this action, plaintiffs ask the Court to declare their easement across defendants' lands be cleared of all encroachments and that defendants be barred from interfering with their use. The Trial Court ruled for plaintiffs. Defendants appeal on the grounds they proved adverse possession of the easement for more than seven years, and plaintiffs are barred from interfering with their use by Tenn. Code Ann. §28-2-103. We reverse the Trial Court's Judgment.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Reversed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Harold G. Jeffers, and Jim Terry, Oneida, Tennessee, for appellants, Penny Caylor, Brian Keith Brock and James D. Yonts.

Robert M. Estep, Tazewell, Tennessee, for appellees, Roger Ball and Carrol E. Rose, LLC.

OPINION

This is in the nature of a declaratory judgment action based on a dispute over an easement of plaintiffs, who have a deeded right-of-way that traverses various properties of defendants who own the properties the right-of-way crosses.

Plaintiffs acquired their property by deed dated May 17, 2002, which provides, " . . . [t]here is further conveyed a 50 foot Right-of-Way [which was contained in predecessors' deeds] leading to Jackson Cemetery and continuing to County Road and TVA Monument 1818-1 as noted on the above mentioned Survey." The Complaint asks "that the court declare that the plaintiffs have a right-of-way easement . . . [that] burdens the property of the defendants . . . . ".

Defendants answered and counterclaimed, and raised the affirmative defenses of abandonment and adverse possession, and in their counterclaim, asked the Court to find that plaintiffs and their predecessors in title had abandoned the right-of-way.

At trial, the Trial Court ruled in favor of the plaintiffs and a Judgment was entered on June 15, 2006 pursuant to plaintiffs' motion for entry of judgment.[1] Another Judgment was entered on June 28, 2006.[2] The Chancellor, in his Opinion, found that the location and width of the right of way was not an issue of fact. Plaintiffs' predecessors in title were granted a fifty foot easement by specific deed. He observed the defense to plaintiffs' case was the seven year statute of limitations under the color of title or abandonment, and there is, he explained, "no proof in . . . [the] record under which an adverse possession claim could be made out because one of the reasons is the . . . defendants have no color of title." Further, there was no evidence that the right of way was abandoned and mere non-use is not abandonment.

Counsel for the defendants' asked the Court to consider Tenn. Code Ann. § 28-2-103 "that can grant adverse possession without title . . . ." The Court reiterated that it was of the opinion that "there's no adverse possession to interfere with the ownership and right of these owners for this right of way". Counsel for the defendants' then asked the Court for findings of fact and the Court responded as follows:

> THE COURT: You don't - - - have anybody that has used this property except to put a septic tank out there, which there is no evidence that the plaintiffs knew about it.
>
> MR. TERRY: There's a building located on it, Your Honor.

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[1]The judgment was signed by the judge and counsel for plaintiffs only.

[2]This Judgment was signed by counsel for both parties and the Judge.

THE COURT: A temporary building, a building that could be moved with a tractor. And that's all the ruling I'm making on this case.

On July 27, 2006 defendants filed a "Motion To Alter Or Amend The Judgment Entered In This Cause On June 28, 2006". At the hearing on the Motion, defendants argued that plaintiffs had stood by without complaining while defendants occupied the right-of-way, and they are no longer in a position to now object. In plaintiffs response to defendants' Motion, plaintiffs argued their predecessors in title had not abandoned the right-of-way because there was no proof offered at trial of a "specific expressed written intent to abandon" as required by law and that mere non-use of the right-of-way does not establish abandonment. Further they argued that defendants' Motion was not timely filed, because the Motion was not filed within thirty days of entry of the judgment, relying on the Judgment being entered on June 15, 2006.

However, the Trial Court entertained defendants' Motion and defendants argued that Tenn. Code Ann. § 28-2-103 provided defendants with the defense of adverse possession without color of title to plaintiffs' possessory action. Defendants further argued that the Court's finding that the septic system was the only evidence offered in support of adverse possession was incorrect as evidence of a barn, shed, fence and part of a deck was situated in the right-of-way had been introduced at trial.

In response to whether the Motion was filed timely the Trial Judge refused to make a definitive ruling, and as to the issue of whether defendants could establish adverse possession, the Trial Court said that he had "interpreted the seven and twenty year statute" and he still thought he was correct that the color of title was necessary to find adverse possession in this case. In overruling the Motion, he observed "[it] would be a good one for the Court of Appeals to look at."

These issues are raised on appeal:

A. Whether or not this appeal is timely due to defendants/appellants filing of their motion to alter or amend the judgment within thirty days of entry of the June 28, 2006 judgment rather than within thirty days of the June 15, 2006 judgment.

B. Whether or not the Trial Court was correct in holding that the seven year statute of limitations provided in Tennessee annotated code section 28-2-103 did not bar plaintiffs from prevailing in this possessory action.

C. Whether or not the Trial Court was correct in holding that defendants'/ appellants' occupation and use of the easement was not sufficient to establish a defense of adverse possession.

The defendants have appealed from the Trial Court's denial of their Motion to Alter or Amend The Judgment Entered in This Cause on June 28, 2006. The standard of review for an appeal of the trial court's denial of a Rule 59.04 motion to alter or amend a judgment is abuse of discretion. *Smith v. Haley*, No. E2000-001203-COA-R3-CV, 2001WL208515 at * 5 (Tenn. Ct. App. March 2, 2001). The Supreme Court explained the abuse of discretion standard in *Eldridge v. Eldridge*, 42 S.W. 3d 82 (Tenn. 2001): "Under the abuse of discretion standard, a trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." *Eldridge* at 85.

Before considering the defendants' appeal of the Trial Court's denial of their motion, plaintiffs' issue of whether the Motion was timely filed must be addressed. According to Tennessee Rule Civil Procedure 59.04, a motion to alter or amend a judgment is timely if "filed and served within thirty (30) days after entry of the judgment. "Entry of the judgment" is described by Tennessee Rule of Civil Procedure 58 as:

> Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk for entry:
>
> (1) the signature of the judge and all parties or counsel, or
>
> (2) the signature of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or
>
> (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

Tenn. R. Civ. P. 58.

The Judgment entered on June 15, 2006 was signed by the Judge and by plaintiffs' counsel, and plaintiffs' counsel's certificate of service stating that the proposed judgment was mailed to defendants' counsel. The Judgment entered June 28, 2006 was signed by the Chancellor and counsel for both plaintiffs and defendants.

The issue thus becomes whether the later entered Judgment supercedes the earlier entered Judgment. The Trial Court had jurisdiction of the case when the later Judgment was entered, under Tennessee Rule of Civil Procedure 59.05. Under the Rule, the Court, on its own initiative, could alter or amend the Judgment. In *Arfken & Assoc. v. Simpson Bridge Co.,* 85 S.W.3d 789 (Tenn. Ct. App. 2002), the Court was confronted with the entry of two Judgments at different times. The majority of the Court held, since one was a photocopy of the other, i.e., identical in all respects, that the 30 day period provided in the rules began to run upon the entry of the first Judgment. Then, shortly thereafter, in *Edwards v. Banco Lumber Co., Inc.,* 101 S.W.3d 69 (Tenn. Ct. App. 2002), this Court was again confronted with the entry of two separate Judgments, but held the 30 day period

began to run from the entry of the second Judgment because the Judgments were not "mirror images of each other". *Id.* 875. In this case, although the language in the body of the Judgment entered June 28, 2006 is identical to the language in the body of the Judgment entered June 15, 2006, the second filed Judgment is not an exact copy of the first filed Judgment, because the first filed Judgment is signed by the counsel for plaintiffs only. The second filed Judgment contains the signature of the Judge and counsel for both plaintiffs and defendants. Under these circumstances, since the Trial Court still had jurisdiction of the case, he could enter the June 28 Judgment, and from his actions obviously intended that it be the final Judgment in the case. We distinguish this Judgment from *Arfken's* rationale because it was not a mirror image of the former Judgment as were the two judgments in *Arfken*. Moreover, counsel for plaintiffs admitted at trial that he filed both Judgments with the Court. If it was error to enter the second Judgment, which we do not concede, plaintiffs' counsel is responsible for the error and would not be entitled to relief. Tenn. R. App. P. 36(a).[3]

Defendants have appealed the Trial Court's Judgment denying their Motion to Alter or Amend the Judgment on the merits, and motions to alter or amend a judgment pursuant to Rule 59.04 permit a trial court to revisit and correct "errors that were made when the court overlooked or failed to consider certain matters." *Ruff v. Raleigh Assembly of God Church, Inc.,* No. W2001-02578-COA-R3-CV, 2003WL21729442 at * 8 (Tenn. Ct. App. July 14, 2003). No evidence was introduced at the hearing on the Motion, but defendants urged the Court to reconsider its findings of law regarding adverse possession, and that the Trial Court abused its discretion by applying an incorrect legal standard. The Trial Court found that there was no adverse possession because the plaintiffs did not have "actual notice of the claim of adverse possession", and there was no color of title as required by the seven year statute [presumably Tenn Code Ann. § 28 - 2 - 101]. This is an incorrect application of the law.

The Tennessee Supreme Court recently reviewed and summarized the doctrine of adverse possession in *Cumulus Broadcasting, Inc. v. Shim*, 226 S.W. 3d 366 (Tenn. 2007) as follows:

> The doctrine of adverse possession is often described as a limitation on the recovery of real property; the limitation period may operate not only as a bar to recover adversely possessed property but it may also vest the adverse holder with title. Ralph E. Boyer, *Survey of the *376 Law of Property* 233, 236 (3d ed.1981). Generally, acquisition by adverse possession for the requisite period of time, whether statutory or under common law, must be (a) actual and exclusive; (b) open, visible, and

[3] **Rule 36. Relief; Effect of Error. -** (a) Relief To Be Granted; Relief Available. - The Supreme Court, Court of Appeals, and Court of Criminal Appeals shall grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires and may grant any relief, including the giving of any judgment and making of any order; provided, however, relief may not be granted in contravention of the province of the trier of fact. Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error. . . .

notorious; (c) continuous and peaceable; and (d) hostile and adverse. *Id.* The adverse possession of real estate is not only inconsistent with the right of the title holder but may, when all elements of the doctrine are present, create an actual ownership interest. *Thompson on Real Property* § 87.01, at 73-74 (David A. Thomas ed., 1994).

Historically, there are several policy reasons used to justify adverse possession, such as: (1) the stabilization of uncertain boundaries through the passage of time; (2) a respect for the apparent ownership of the adverse possessor who transfers his interest; and (3) assurance of the long-term productivity of the land. Title by either possession or prescription are old subjects in the English Law, according to one treatise, with counterparts in the Roman Law. Boyer, *Survey of the Law of Property* 764; *see Taylor ex dem. Atkyns v. Hord,* 1 Burr. 60, 97 Eng. Rep. 190 (K.B.1757); *see also Freeman v. Martin Robowash, Inc.,* 61 Tenn. App. 677, 457 S.W.2d 606, 609-10 (Tenn. Ct. App.1970).

As indicated, limitations of real property actions, i.e., the statutory forms of adverse possession, are found in Tennessee Code Annotated sections 28-2-101 through 103. Initially, land granted by the state, for example, requires only a period of seven years' adverse possession under a recorded assurance or color of title,[FN3] terms which are used interchangeably. Tenn. Code Ann. § 28-2-101 (2000); *see, e.g., Slatton v. Tenn. Coal, Iron, & R.R. Co.,* 109 Tenn. 415, 75 S.W. 926, 927 (Tenn.1902). Another provision, Tennessee Code Annotated section 28-2-105, does not require any proof of a state land grant but does prescribe assurance of title for thirty years and a minimum of seven years of adverse possession. The limitations on actions statutes, described in Tennessee Code Annotated sections 28-2-102 and 103, are defensive only, barring only the remedy. *Kittel v. Steger,* 121 Tenn. 400, 117 S.W. 500, 503 (Tenn.1909). These rights may be utilized by the adverse holder only in the defense of a suit and not as a means to bar use by the rightful owner. *Savely v. Bridges,* 57 Tenn. App. 372, 418 S.W.2d 472, 479 (Tenn. Ct. App.1967). Tennessee Code Annotated section 28-2-102 provides a defense when there is assurance of title and seven years possession; this statute serves as protection as to the entire boundary as described. Section 28-2-103, which does not involve color of title, protects an adverse holder after a period of seven years but only as to that portion of the land in his actual possession. *Shearer v. Vandergriff,* 661 S.W.2d 680, 682 (Tenn.1983). (Emphasis supplied).

FN3. " 'Color of title' is something in writing which at face value, professes to pass title but which does not do it, either for want of title in the person making it or from the defective mode of the conveyance that is used." 10 *Thompson on Real Property* § 87.12, at 145.

Cumulus Broadcasting, Inc., 226 S.W.3d at 375 -377.

Continuous successive possessions, or tacking, may be used to establish the requisite period of years needed to establish adverse possession under common law or the statutes. "Tacking requires that the combined periods be successive, that each possession must meet the elements of prescriptive easement, and that the possessions be in privity." *Laurel Valley Property Owners Ass'n, Inc. v. Hollingsworth* No. E2003-01936-COA-R3-CV, 2004 WL 1459404, *8 (Tenn.Ct. App. June 29, 2004) *(*citing *Thompson v. Hulse***,** No. E1999-02474-COA-R3-CV, 2000 WL 124787, at *3 (Tenn. Ct. App. Jan. 26, 2000)).

A easement is subject to adverse possession and will be extinguished by twenty years of adverse use. *Boyd v. Hunt,* 102 Tenn. 495, 52 S. W. 131, 132 (1899). A suit to abate adverse use of an easement must be brought within seven years from the time the adverse use began or the right of action is lost under Tenn. Code Ann. § 28 - 2 - 103. *Shearer v. Vandergriff*, 661 S.W. 2d 680, 682 (Tenn. 1983). Section 28 - 2 - 103 provides a statute of limitation that protects an adverse user of land without color of title from a possessory action by the owner of the property. *Michael v. Jakes,* No. M1999-02257-COA-R3-CV, 2002 WL 1484448 at * 12 (Tenn. Ct. App. July 12, 2002). Tenn. Code. Ann. § 28 - 2 - 103 provides:

> (a) No person or anyone claiming under such person shall have an action, either at law or in equity, for the recovery of any lands, tenements, or hereditaments, but within seven (7) years after the right of action accrued.
>
> (b) No possession of lands, tenements or hereditaments shall be deemed to extend beyond the actual possession of an adverse holder until the muniment of title, if any, under which such adverse holder claims such lands, tenements or hereditaments is duly recorded in the county in which the lands are located.

A party who adversely possesses land for seven years, without color of title, obtains a possessory interest in the property possessed. This possessory right or "defensive title" continues as long as the actual possession is maintained. The possessory right to the property created by the statute provides the adverse possessor with the right to bring legal action for trespass or for an injunction to prevent repossession. Likewise, the possessory right creates a defensive right in the adverse possessor against anyone, including the holder of title to the land, who seeks to dispossess the adverse possessor. Once the required seven years of adverse possession is established the adverse possessor retains possession of the property until such possession is surrendered. *Michael v. Jakes*.

The Trial Court erred in refusing to apply Tenn. Code Ann. § 28 - 2 - 103, if defendants proved that they had adverse possession of parts of the right-of-way for the requisite seven years. The Tennessee Supreme Court set out the defendants' burden of proof in *Cumulus Broadcasting,* 226 S.W.3d 366:

> Adverse possession is a question of fact. *Wilson v. Price,* 195 S.W.3d 661, 666

> (Tenn. Ct. App. 2005). The burden of proof is on the individual claiming ownership by adverse possession and the quality of the evidence must be clear and convincing. *O'Brien v. Waggoner,* 20 Tenn. App. 145, 96 S.W.2d 170, 176 (Tenn. Ct. App.1936). The actual owner must either have knowledge of the adverse possession, or the possession must be so open and notorious to imply a presumption of that fact. *Kirkman v. Brown,* 93 Tenn. 476, 27 S.W. 709, 710 (Tenn.1894).

Cumulus Broadcasting at 377.

Defendants offered clear and convincing proof that they had continuous, actual and exclusive possession of parts of the right-of-way that ran through their individual properties and that such possession was open, visible, and notorious. [4]

The Court in *Michael v. Jakes* reviewed cases where the courts found adverse possession based on factual scenarios similar to the defendants actions. *See, e.g., Bensdorff v. Uihlein,* 132 Tenn.193 at 200-01, 177 S.W.481 at 483 (Tenn. 1915); *Lamons v. Mathes,* 33 Tenn. App. 609, 232 S.W.2d 558 (1950); *Peoples v. Hagaman,* 215 S.W.2d 828, 829-30; *Davis v. Inman,* No. 01-A-01-9706-CH00254, 1999 WL 326157, at *2 (Tenn. Ct. App. May 25, 1999). *Michael,* 2002 WL 1484448, at *9. *See also, Sweeton v. Orange,* No. M2002-00211-COA-R3-CV, 2003 WL 1955200, *6 (Tenn. Ct. App. April 25, 2003); *McBee v. Elliott,* No. M2002-00271-COA-R3-CV, 2003 WL 1542149 at *4 (Tenn. Ct. App. March 26, 2003).

The evidence offered at trial, preponderates against the Trial Court's finding that defendants had not possessed parts of the right-of-way across their land for at least seven years and that the possession was of such an open and obvious nature to put plaintiffs on notice. The preponderance of the evidence establishes adverse possession as contended by defendants.

At trial, plaintiffs did not offer any evidence to rebut the testimony regarding the use of the 50 ft. easement. The Trial Court incorrectly applied the law, when it refused to find that Tenn. Code Ann. § 28 - 2 - 103 barred plaintiffs' cause of action. The Trial Court further erred when it found that there was no adverse possession because "the owner had no actual notice of the claim of adverse possession." A showing of actual knowledge is not necessary if the possession is so open and notorious that there is an implied presumption of that fact. *Kirkman v. Brown,* 93 Tenn. 476, 27 S.W. 709, 710 (Tenn.1894). The evidence establishes defendants' possession was open and notorious. Moreover, plaintiffs offered no testimony as to whether they were aware of the defendants' activities or not. For the foregoing reasons, the Trial Court's denial of defendants' Motion to Alter or Amend the Judgment was an abuse of discretion, and the cause is remanded for entry of an Order based upon the record as to the right-of-way defendants adversely possessed and

[4] The character of possession and the acts shown to establish possession are the same under the statute of limitations as under the common law doctrine of adverse possession. *Michael v. Jakes,* 2002 WL 1484448 at * 12.

are entitled to continue to possess.

We reverse the Judgment of the Trial Court and remand, for the foregoing reasons, and assess the cost to the plaintiffs.

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HERSCHEL PICKENS FRANKS, P.J.